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| ONR Guidance Document  The Role of the Approval Officer in Enforcement Decisions |



ONR Guidance Document

The Role of the Approval Officer in Enforcement Decisions

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# Introduction

1. The ONR Guide ‘Conducting Investigations’ describes the investigation process as a number of steps [1]. Step 1 starts when ONR receives notification of an incident. During Step 2 an inspector decides whether the incident merits full investigation, usually by conducting ‘preliminary enquiries’. If it does, plans are made and resources allocated to undertake the work.
2. At Step 4 the investigation is undertaken until the Lead Investigator has collected sufficient information to make an enforcement recommendation to the Approval Officer. [1] defines the Approval Officer as follows:

‘The **Approval Officer** is the warranted inspector responsible for deciding whether or not to commence [or recommend] a prosecution on behalf of ONR. The **Approval Officer** is appointed by the divisional director and would normally be the relevant delivery lead. Alternatively, and with the agreement of the Chief Nuclear Inspector (CNI), the divisional director may take on the role of **Approval Officer**. This appointment should be made in writing at the outset of the investigation.’

1. Step 4 of the investigation process then says:

‘The **Approval Officer** will make the final enforcement decision after discussions with the **lead investigator** and, if they feel it necessary, withthe divisional director, other interested parties such as Professional Leads (PLs), technical specialists and, where relevant, the solicitor agent. The Approval Officer must record or reference any advice received. The Approval Officer’s decision on whether or not to take the matter to court must be made in accordance with the ONR Enforcement Policy Statement (EPS) [2], the ONR Enforcement Management Model (EMM) [3] and the Code for Crown Prosecutors [4], in England and Wales [and the Prosecution Code [5], in Scotland].’

1. The EMM and the EPS are discussed elsewhere. This guide considers those parts of [4] and [5] which are relevant to the role of the Approval Officer in ONR.

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# Purpose and scope

1. This guide explains the criteria that the ONR Approval Officer must consider when applying [4] and [5]. These Codes are produced by the Crown Prosecution Service (CPS) for use in England and Wales, and by the Crown Office Procurator Fiscal Service (COPFS) for use in Scotland. Both Services act on behalf – but independently - of government to ensure crimes are investigated justly. The Services have both adopted the statement produced by the International Association of Prosecutors – *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.* They have produced their own Codes to reflect the international standard in terms relevant to each jurisdiction.
2. The criteria from the above Codes relevant to this document fall into two categories firstly evidential, and secondly those relevant to the public interest.
3. This guide supports the Approval Officer in making consistent decisions in line with [4] and [5]. The guide supplements training provided to Approval Officers by ONR. It is not intended for this guide to be used as a substitute for engagement with the other interested parties described above, if the Approval Officer wishes to do so.

# The Codes

1. It is worth noting that whilst both [4] and [5] consider the evidential and public interest criteria there are some areas where the Codes differ.   
   Those differences are primarily down to legal processes that differ between the two jurisdictions. They do not affect the role of the Approval Officer.
2. The Crown Prosecution Service prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. The CPS is independent, and makes its decisions independently of the police and government.
3. When deciding whether to prosecute a criminal case, CPS lawyers must follow the Code for Crown Prosecutors [4]. This means that to charge someone with a criminal offence, their prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction   
   (more than 50% likelihood), and that prosecuting is in the public interest.
4. The Crown Office and Procurator Fiscal Service (COPFS) is Scotland’s prosecution service. They too receive reports about crimes from the police and other reporting agencies. They will receive a report about the initial crime investigation and then decide what action to take.
5. However, one of the main roles of COPFS is to investigate crime, and this contrasts with the role of the CPS who expect the investigating organisations to investigate, collect the evidence, and present their arguments.   
   Therefore the CPS role is more limited compared to the remit of COPFS.
6. The aim of COPFS is to meet the Law Officers’ strategic priority of achieving operational effectiveness in all cases. This means some of the criteria described in the Prosecution Code relate to investigation management, and direct measures that do not involve the accused going to court, for example written or verbal warnings by the fiscal, a fine, a fixed penalty conditional offer of between £50 and £300, and other diversions from prosecution such as reparation and mediation.
7. However, in both jurisdictions both the evidential and the public interest criteria must be met when considering prosecution.

# Health and Safety Offences, Corporate Manslaughter and Food and Hygiene Offences – Definitive Guideline

1. This guideline is effective from 1st February 2016 [6]. It applies to all organisations and offenders aged 18 and older, who are sentenced on or after 1 February 2016, regardless of the date of the offence, for offences covered by the guideline. It was produced by the Sentencing Council for England and Wales, and courts in England and Wales must, in sentencing an offender, follow those sentencing guidelines which are relevant to the offender’s case. A caveat is “unless the court is satisfied that it would be contrary to the interests of justice to do so.”
2. In Scotland, the guideline has no definitive status. However it is recognised as relevant by the courts in Scotland, and so the Approval Officer will need to have proper regard to the Guideline when considering investigation reports put to them by the lead investigator, for investigations in both jurisdictions.
3. The guideline is referred to later at section ‎6, and in associated documents, for example, the ONR investigation report.

# Evidential Criteria

1. The International Association of Prosecutors (IAP) standard of professional conduct states:

‘[A prosecutor] will proceed only when a case is well founded on evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.’ [7]

1. Evidence is defined in the Oxford Dictionary of English ‘as information drawn from personal testimony, a document, or a material object, used to establish facts in a legal investigation or as testimony in a law court.’
2. All elements of a charge against a defendant in a criminal case must be proved to the requisite standard, i.e., beyond all reasonable doubt, before a court can find a defendant guilty of an offence. In general, for there to be sufficient evidence against a defendant there must be corroboration from at least two separate sources to establish the essential facts of the case.   
   In Scotland, this is a legal requirement for the vast majority of offences.   
   In England and Wales having two separate sources to establish the essential facts is a sound legal principle.
3. From the CPS Code for Crown Prosecutors:

‘Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge[[1]](#footnote-2). They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.’ [4]

1. For the ONR Approval Officer, a realistic prospect of conviction is based on their objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. All of this evidence and information should be presented to the Approval Officer by the Lead Investigator in the investigation report so they can make the objective assessment.
2. As well as sufficiency, the material used to demonstrate the essential facts to a court must also be admissible i.e. the court will allow the material to be used to prove the essential facts of a case, and reliable i.e. the court can accept the provenance of the material. Collecting, managing, and exhibiting material as evidence is considered in other ONR guidance. The guidance considers what must be done in order to ensure that material meets the rules of evidence that apply in England and Wales, and Scotland.
3. Unless the evidential criteria are met then proceedings cannot be considered, irrespective of whether it is in the public interest to bring proceedings.

# Public Interest Criteria

1. The following guidance considers those public interest criteria which are relevant to the work of the ONR. The guidance references the CPS Code for Crown Prosecutors [4] but the Prosecution Code [5] considers what action is in the public interest in a similar manner. The guidance is therefore applicable to the work of ONR in both England and Wales, and Scotland.   
   It was produced by ONR Solicitor Agents (E&W).

## Guidance on the Application of the Public Interest Test

1. The Public Interest Test is set out in detail in the Code for Crown Prosecutors [4] at paragraphs 4.9 onwards.
2. The test is applied to all cases that have passed the evidential test. i.e., those cases that have been assessed as having a realistic prospect of conviction.
3. When considering the public interest test, the starting point is that a prosecution will usually take place unless the Approval Officer is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour of one. Each case is unique and must be considered on its own merits.
4. When applying the test, the CPS Code states that prosecutors should consider a number of specific factors to determine an overall assessment of the public interest; these factors are dealt with below.
5. When considering these factors, it may be that there are some factors which point in favour of a prosecution whilst others point against prosecution.   
   The application of the test is therefore a balancing exercise and as outlined above a prosecution will usually take place unless the factors against prosecution outweigh those in favour of the same.

**How serious is the offence committed?**

1. As one might expect the principle here is that the more serious the offence, the more likely it is that a prosecution will be required.
2. The word "serious" in its normal meaning includes “something that is significant or worrying because of danger or risk” (Concise Oxford Dictionary). In the regulatory enforcement context therefore, an offence can clearly be viewed as a serious offence if it involves the risk of serious injury or death to one or more persons.
3. If that risk materialises into a person sustaining serious injury, or being killed, then the offence will be of the most serious kind.
4. ONR’s Enforcement Policy Statement (EPS) [2] confirms that it will normally prosecute or recommend prosecution where death was a result of a breach of the legislation **or** where the gravity of an alleged offence, together with the seriousness of any actual or potential harm, warrants it.
5. These factors are therefore key considerations when ONR comes to apply the public interest test.
6. It is important to consider potential harm as well as actual harm because in some cases it may well have been a matter of pure luck that a person was not killed or injured. It is for this reason that the current Sentencing Guidelines for health and safety offences (‘the Guidelines’, refer to section ‎4) direct that the sentencing process should involve looking firstly to the level of harm **risked** by the offence, before then considering any **actual** harm that may have resulted from the offence.
7. The EPS also cites that ONR will consider or recommend prosecution where:
8. It may be appropriate as a way to draw general attention to the need for compliance with the law and the maintenance of standards required by the law and where a conviction may deter others or where
9. A breach giving rise to a significant risk has continued despite relevant warnings from employees, or their representatives, or from others affected by a work activity.
10. The CPS Code also suggests that when assessing the seriousness of an offence prosecutors should include consideration of the culpability of the potential Defendant which is dealt with below.

**What is the level of culpability of the Dutyholder?**

1. The greater the level of culpability, the more likely it is that a prosecution may be required.
2. A deliberate breach or demonstrating a flagrant disregard for the law would amount to the highest level of culpability.
3. The EPS [2] states that a prosecution will normally follow where a dutyholder’s standard of managing its legal responsibilities is found to be far below what is required by legislation and has given rise to a significant risk.
4. The Guidelines when dealing with culpability also require a consideration of, amongst other matters, how far short of the appropriate standard the dutyholder has fallen.
5. The Guidelines highlight the following matters as all being indicative of falling **far short** of the appropriate standards:
6. failing to put in place measures that are recognised standards in industry,
7. ignoring concerns raised by employees or others,
8. failing to make appropriate changes following prior incidents and
9. allowing breaches to subsist over a long period of time
10. A serious or systemic failure on the part of an organisation to address risks to health and safety will also amount to High culpability.
11. If none of the above factors are present and the dutyholder has systems in place but they were not sufficiently adhered to, it is likely to fall within the Medium culpability bracket for sentencing purposes. The fact that a dutyholder falls into the Medium bracket would not in itself be a factor tending against prosecution, as by its very definition that bracket applies to a medium level of breach when placed before the court.
12. Low culpability will apply where there are only minor failings and an offender does not fall far short of the appropriate standard. On its own that may be a factor pointing away from prosecution but each case needs to be assessed on its individual circumstances and it may be that other factors such as the seriousness of an offence, or the harm risked or realised, may outweigh the same.
13. In assessing the culpability of a dutyholder it will also be appropriate to consider any previous criminal convictions or other enforcement action taken against it in the past. The EPS [2] states that it will normally prosecute where the general record and approach of the offender warrants it **or** where there have been repeated breaches which give rise to significant risk, **or** where there has been persistent and significant poor compliance.
14. The EPS [2] also expects ONR to prosecute where there has been a failure to comply with a Notice or Direction, where false information has been supplied wilfully, where there has been intent to deceive in relation to a matter which gives rise to significant risk, or where inspectors have been intentionally obstructed.
15. In the case of individuals, culpability is assessed by reference primarily to the state of mind of the individual as revealed by their actions or lack of action. An individual who intentionally breaches or flagrantly disregards the law will fall within the Very High culpability bracket. Someone who commits an offence whilst having actual foresight of the risk of offending, or being wilfully blind to the same, will be within the High culpability bracket.
16. Medium culpability for individuals applies where an offence has been committed through an act or omission which a person exercising reasonable care would not commit.
17. Low culpability will apply where the offence has been committed with little fault on the part of the individual.

**What are the circumstances of, and the harm caused to the victim?**

1. ONR’s ultimate function as set out in its EPS [2] is to ensure that “dutyholders manage and control risks effectively thus preventing harm to the standards required by law.” Prevention of harm is therefore at the heart of ONR’s objectives.
2. Where an employee or member of the public has been killed or has sustained serious injury as a result of the dutyholder’s breach this will significantly increase both the seriousness of an offence and the likelihood of a prosecution taking place.
3. As set out under “seriousness” above, the EPS specifically states that it will normally prosecute where death was a result of a breach or where the gravity of an offence together with the seriousness of the harm suffered, or risked, warrants it.
4. Finally, the CPS Code recognises that it is appropriate to take into account the views expressed by the victim about the impact that the offence has had upon them. In cases involving serious injury a Victim Personal Statement will be obtained from the injured person. Where a victim has died as a result of a breach then the views of the victim’s family may also be taken into account in appropriate circumstances.

**What was the suspect’s age and maturity at the time of the offence?**

1. This is unlikely to be a significant factor in regulatory prosecutions as it would only apply where an individual was being considered for prosecution and that individual was either a young person or otherwise lacking in normal maturity.

**What is the impact on the community?**

1. Here the greater the impact of the offending on the community the more likely it is that a prosecution is required.
2. It is important to note that this item requires consideration as to the impact of the **offending** upon the **community** and not the impact of any potential prosecution upon the **dutyholder**.
3. “Community” for these purposes can refer to people who live in a particular location. This would clearly be a relevant issue where for example a dutyholder’s breach creates a significant public nuisance or risk to those living close by to a dutyholder’s premises.
4. Community can also refer to a group of people such as an occupational group.

**Is prosecution a proportionate response?**

1. The CPS Code recognises that this may be a relevant consideration where the cost of a prosecution might be disproportionate to a likely penalty, where for example the level of offending is comparatively low, and a nominal penalty might be the outcome. The Code is clear however to the effect that the public interest should not be decided upon the basis of this factor alone.
2. In the context of the regulatory enforcement of substantial corporate organisations when one applies the Sentencing Guidelines to such organisations a nominal penalty can be seen as an extremely unlikely outcome of most prosecutions.

**Do sources of information require protecting?**

1. The Code suggests that special care should be taken when proceeding with a prosecution where details may need to be made public that could harm sources of information, ongoing investigations, international relations or national security.
2. This is unlikely to prevent many regulatory prosecutions from proceeding through the courts, but it may require certain cases to be kept under review and may also require the agreed redaction of documents for security reasons in some of the cases that do proceed

# Checklist for the Approval Officer Considering Investigation Report

1. The following is a checklist that can be used by the Approval Officer to remind themselves of the relevant points to consider when considering and completing the investigation report. It is not intended to be comprehensive, rather to help the Approval Officer come to a reasoned decision that is transparent and consistent.

## Checklist

**Evidential Test**

* Does the report set out in clear terms any alleged breaches on the part of the dutyholder? If not, do you require clarification from the investigating inspector?
* Consider the core prosecution witness evidence. Do those statements provide you with a clear understanding of the issues in the case and do they contain **sufficient admissible evidence?** If not, could further statements or other forms of evidence be obtained that would assist you to reach your decision?
* Consider how far short of the appropriate standard the dutyholder has fallen.
* Has the dutyholder been given the opportunity to provide an account / make representations and if so, have you been provided with a summary of the dutyholder’s account?
* Has the law been correctly applied to the circumstances of the case?
* Is there sufficient reliable and credible evidence to provide a reasonable prospect of conviction? In other words, is it more likely than not that a court would convict?
* Have the views of the victim been adequately considered?
* Has the unused material collected during the investigation been adequately considered (and disclosed) by the investigator?
* If an expert has been used has the reason why been adequately explained? Have they been instructed in line with current Court Directions and Practices? If so, move on to the public interest test and in this connection, consider the ONR’s Enforcement Policy Statement before making any final decision.

**Public Interest Test**

* What is your assessment of the culpability of the dutyholder?
* What is the level of harm risked by the dutyholder’s breach and what is the level of any actual harm sustained? Is there sufficient evidential detail in this regard or should further evidence be obtained?
* What is your assessment of the seriousness of any offences that have been committed?
* Does the dutyholder have any previous health and safety related convictions?
* What is the nature of the dutyholder’s general enforcement history?
* Is there a Victim Personal Statement available for your consideration?
* Have you considered the views of the victim, or in the case of a fatality, the victim’s family, before concluding the public interest test?
* Has the inspector identified the correct charges that the dutyholder should face, or are there other offences which would be more appropriate for the circumstances of the case?

Remember that once a decision is taken to prosecute or not to proceed and the dutyholder has been advised of this decision, the victim is also then entitled to be notified of the decision.

# References

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| [1] | ONR, “ONR-ENF-GD-005 - Conducting Investigations”. |
| [2] | ONR, “Enforcement Policy Statement (EPS),” 2020. [Online]. Available: http://www.onr.org.uk/documents/2014/enforcement-policy-statement.pdf. |
| [3] | ONR, “ONR-ENF-GD-006: Enforcement”. |
| [4] | CPS, “The Code for Crown Prosecutors,” October 2018. [Online]. Available: https://www.cps.gov.uk/publication/code-crown-prosecutors. |
| [5] | Crown Office and Procurator Fiscal Service, “Prosecution Code,” 2018. |
| [6] | Sentencing Council, “Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences - Definitive Guideline,” February 2016. [Online]. Available: https://www.sentencingcouncil.org.uk/wp-content/uploads/Health-and-Safety-Corporate-Manslaughter-Food-Safety-and-Hygiene-definitive-guideline-Web.pdf. |
| [7] | International Association of Prosecutors (IAP), “Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors,” 1999. |

1. For the purpose of the CPS, “conviction” includes a finding that “the person did the act or made the omission” in circumstances where the person is likely to be found not guilty on the grounds of insanity. [↑](#footnote-ref-2)